M.U. and FEDERATION REPORTS.

WONG POH (f) v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Hill, J.) July 1, 1947]
[Kedah — Criminal Appeal No. 36 of 1947]

Kedah Sanitary Boards Enactment S. 13 — Kedah Sanitary Boards (Amendment) Enactment No. 7 of 1358 Ss. 2 and 3 — Whether bye-laws are ultra vires — Interpretation Ordinance S. 11.

The Kota Star Town Board on 18/8/46 appointed a sub-committee to consider the question of unauthorised buildings in the town area which recommended the demolition of all such erections by the end of December 1946. These recommendations were accepted by the Board and a notice dated 30/9/46 was served on the appellant on 6/10/46 demanding demolition of a shed at No. 5 Back Lane, Pekan Malayu, Alor Star, erected by the appellant during the Japanese occupation. This shed appeared to have been put up without any written authority from the Sanitary Board.

The notice was ignored and the appellant was charged before the Magistrate at Alor Star under section 13, Building Bye-Laws, Kedah Enactment No. 106 (Sanitary Boards) for non-compliance of the requirements of this notice and was convicted and fined $200/-- in default one month's R.I. and an order was made empowering the Sanitary Board to demolish the shed within two weeks, expenses to be borne by the appellant.

Against this decision the appellant appeals. The grounds of appeal briefly are as follows:—

(a) The Notice, purporting to be a Notice served in pursuance of Bye-Law 13 made under Sanitary Boards Enactment 106, is vague and uncertain in its terms and is therefore bad;

(b) There was no evidence that the Sanitary Board considered the appellant's premises or decided that they were unsuitable, and the Notice is therefore bad;

(c) The said Bye-Law is ultra vires being a Bye-Law which the Authority has no power to make under the Sanitary Boards Enactment 106;

(d) The said Bye-Law has ceased to be in existence as Section 4 of the Sanitary Boards Enactment 106 which provides for what objects Bye-Laws may be made and Section 5 which empowers the making of Bye-Laws were repealed by Sections 2 & 3 of the Sanitary Boards (Amendment) Enactment No. 7 of 1358.

Held, (1) that notices under the Sanitary Bye-Laws to demolish unauthorised buildings must be clear and unambiguous but as the objection in this case was purely technical the notice was good; (2) the Bye-Law was prolonged in its effect by virtue of S. 11 of the Interpretation Ordinance and was therefore not **ultra vires**.

CRIMINAL APPEAL.

T. E. Conaghan for the Appellant.

C. V. Boyle for the Respondent.

Hill, J. : — The grounds of appeal were argued most persuasively by Mr. Conaghan and I have given them the careful consideration they deserve.

With regard to (a) of the grounds of appeal it was argued that because the words "to the locality" were omitted after the word "immediately" the notice served on appellant was vague and uncertain and therefore bad.

While it is true that such notices must be clear and unambiguous, I consider the objection in this instance to be merely technical and I rule that the notice was good.

With regard to (b), it appears that the Board considered and adopted a report by a Committee appointed by it. This report submitted that the shed was unsuitable to the town and dangerous to health. This ground of appeal must therefore also fail.

With regard to (c) and (d), it is correct that Sections 2 and 3 of the Sanitary Boards (Amendment) Enactment No. 7 of 1358 repealed Section 5 but these sections must also be regarded as re-enactments and further, I can only construe Section 11 of the Interpretation Ordinance, if it is to have any meaning, as prolonging the Bye-Law. I therefore rule that this Bye-Law is not *ultra vires*.

Finally, I have to consider the sentence. I was informed that not only was this the first case of this kind brought before the Court but that appellant has no previous convictions of any sort.

I am of opinion that the imposition of the maximum sentence was unduly severe. While therefore I dismiss the appeal and confirm the conviction and order of demolition, I reduce the fine imposed to one of $50/- (fifty dollars).

Sentence Reduced.

IN RE THE ESTATE OF LAM CHEE TONG (DECEASED).

[Orig. Civil Juris. (Carey, J.) October 31, 1947]

Will — Construction — Meaning of "children" — Whether adopted children are included — Adoption of Children Ordinance No. 18 of 1939.

The question raised in this Originating Summons was whether upon the true construction of the last will of Lam Chee Tong, deceased, the words "child (or children)" appearing in the certified English translation of the Will meant and included the adopted children of the said deceased. The facts were that at the time of making the Will, the testator was married and had no legitimate children but had two adopted children in Malaya and one in China.

Held, (1) that the term "children" in a Will **prima facie** means legitimate children; (2) that in the cases in which the term children had been held to include "adopted children" there was in the Will an intention expressed by the testator or necessarily implied from the wording of the Will or surrounding circumstances that the testator intended in using the word "children" **to**

include "adopted children"; (3) that in the present case there was nothing in the Will and surrounding circumstances to justify the extension of the word "child" or "children" to include "adopted children".

Cases referred to :—

(1) *Hill v. Crook* L.R. 6. H.L. 265.

(2) *Quaik Kee Hock v. Wee Geok Neo* 4 Kyshe 128.

(3) *In re Tan Cheng Siong deceased, Dunman v. Tan Seng Hwee and another* (1937) S.S.L.R. 293 (1937) M.L.J. 87.

(4) *Cheok Chin Huat and others v. Cheok Chin Soo, Cheok Hoon Jee and others* (1937) S.S.L.R. 103 (1937) M.L.J. 157.

(5) *Re Lim Yew Teok deceased, British Malaya Trustee and Executor Co. Ltd and another v. Chan Mek Tuan and two others* (1937) S.S.L.R. 92 (1937) M.L.J. 233.

(6) *In re the Estate of Khoo Khye Chear deceased, Russell v. Khoo Boo Boon and others* (1938) S.S.L.R. 356 (1937) M.L.J. 244.

ORIGINATING SUMMONS.

Mrs. B. H. Oon for the Executor and Trustee, Cheah Weng Hon.

K. S. Pillai for the Widow, Cheh Yoong.

Lim Khye Seng for the adopted daughter, Lam Wai Cheng.

Carey, J. : — The question herein for the Court is, whether upon a true construction of the last Will of Lam Chee Tong, deceased, the words "child (or children)" appearing in the eleventh and twelfth lines of the certified English translation of the Will mean and include the adopted children of the said deceased.

The Will in question was written in Chinese. The official translation of it is as follows :—

> I have been ill for a long time. Lately, Chinese and Western doctors have been called in for treatment but there has been no improvement. In order to make good provisions for the future, I hereby intrust all the property in my name, such as, share in Sang Loong and monies in the bank and so forth to Cheh Weng Hen who shall be manager with full powers and also attend to (my) family requirements. When travelling back to China can be done without hindrance, (he) shall sell and convert (the property) into money and then deliver it to my wife Cheh Yoong and child (or children) to be used as funds for their maintenance on their return to the home country.
>
> This is my Will.
>
> Thumb print of
> Lam Chee Toong
>
> Witnesses:—
> Lee Man
> Lam Foo
> Cheh Khai Seng
> Cheh Lee Yuen
> Cheh Khuan
> Foong Yee Hoi
>
> Writer:—
> Cheh Khuan
>
> Dated the 26th day of the 7th moon Kah Sin Year corresponding to the 13th day of September, 33rd year of the Chinese Republic (1944).

The Chinese word for "child" and "children" is the same, so that, where, as in this Will, it is used without qualification, it may mean either the singular or plural.

The facts are that the deceased first married the elder sister of the applicant and she died in China about 25 years ago, leaving no issue.

The deceased, Lam Chee Tong, died at Perlis on the 21st September, 1944, leaving his widow Cheh Yoong, who had no issue by him, and two adopted children who lived with him in Perlis. Cheh Yoong and the friends of the deceased believed the latter to have had another adopted son in China, but the name, age and whereabouts of such other adopted son are not known.

At the time of his death the deceased was aged 57 years and his widow 42 years. They had been married for about 20 years. The cause of the deceased's death was advanced tuberculosis of the lungs, from which he had suffered for 3 years, being confined to his bed for the last 3 months of his life. The Will was dated eight days before his death.

There are represented before the Court the executor-trustee of the deceased's estate, the applicant, (2) the widow of the deceased and (3) the adopted daughter of the deceased who may be taken to represent the class of "adopted children".

There is no evidence before the Court of any formal adoption of the children nor is there any of any Chinese usage or custom whereby any special meaning can be attached to the word "child" or "children" when used by a Chinese man.

The first general rule as to the construction of wills is broadly that the intention of the testator is to be given effect to. Such intention is to be ascertained from what the testator has expressed in the will. There is nothing in the present will to indicate the intention of the testator in regard to the question asked, beyond the statement "When travelling back to China can be done without hindrance (he the applicant) shall sell and convert (the property) into money and then deliver it to my wife Cheh Yoong and child (children) to

be used as funds for their maintenance on their return to the home country." Mr. Lim Khye Seng for the adopted daughter refers to the opening sentences of the will and suggests that the testator knew he was unlikely to recover. The will was made during the Japanese occupation and the reference to "when travelling back to China can be done without hindrance" would at least mean when travelling between Malaya and China was again possible and as the testator directed his executor to deliver at that time the money from his converted property to his wife and child (children) it can be assumed he did not anticipate living till then, but when that might be he had then no means of knowing. It might also be argued that as delivery by the applicant was to be made to testator's wife and child (children) at the time when travelling back to China could be done without hindrance it was necessarily implied that only the child (children) travelling back to China and not any child who was already in China could benefit under the will. Taking this view Mr. Lim Khye Seng would have the adopted son in China excluded.

However, it seems to me that it will not be necessary for me to pursue the matter so far. Here, I am limited by what is contained in the will and the only reference is to child (children).

There have been several cases on the same or cognate points in this country and since the decision of such reported cases to which I have been referred, there has been enacted the Adoption of Children Ordinance No. 18 of 1939 which enables this Court in a proper case to make an adoption order authorizing an applicant to adopt a specified infant. It is significant to note the effect of an adoption order as provided in section 6 (2) and (4) of the Ordinance.

> 6. — (2) An adoption order shall not deprive the adopted child of any right to or interest in property to which, but for the order, the child would have been entitled under any intestacy or disposition, whether occurring or made before or after the making of the adoption order, or confer on the adopted child any right to or interest in property as a child of the adoptor, and the expressions "child", "children" and "issue" where used in any disposition whether made before or after the making of an adoption order, shall not, unless the contrary intention appears, include an adopted child or children or the issue of an adopted child.
>
> (4) For the purposes of this section 'disposition' means an assurance of any interest in property by any instrument whether inter vivos or by will including codicil.

The term "children" in a will *prima facie* means legitimate children, *Hill v. Crook*[1]. By virtue of English law the word "children" should apply to children born in wedlock unless there be in the will and in what is called surrounding circumstances, anything showing that the word is capable of a broader sense, and therefore includes a larger class of children, *Quaik Kee Hock v. Wee Geok Neo*[2]. In *In re Tan Cheng Siong deceased, Dunman v. Tan Seng Hwee and another*[3], at pages 299-300 McElwaine C.J., S.S. says in his judgment :—

> When construing an English will in an English Colony where adoption is not part of its law common or statute I think the word should not be taken as including an adopted child unless the will indicates that such is intended. The adopted child does not in English law take under an intestacy of his adoptive 'father': why should he take under the will of that 'father' to the detriment of that father's natural children?
>
> Under the English Act of 1926 an adopted child succeeds on the intestacy of his natural parents, not on the intestacy of his adoptive parents. So far as I know it has not been decided (and certainly it does not arise for decision in this case) that adoption as the word is used in this Colony deprives a person adopted into one family from succeeding on the intestacy of his natural father, nor that a bequest to 'my children' cannot be shared by a natural legitimate child who has been adopted into another family.

The point raised there has been dealt with in the Adoption of Children Ordinance to which I have referred *supra* and provisions similar to those prevailing in England have been made.

Admittedly the testator in the present case at the time of making his will had no children, other than adopted children and none has been born to his wife or widow since, but in accordance with natural laws the deceased being 57 years of age and his wife at that time 42 years, one cannot exclude the possibility of a child being born to them being in the contemplation of the testator when he made his will and this, even though at that time they had been married for 20 years without issue. *In Cheok Chin Huat and others v. Cheok Chin Soo, Cheok Hoon Jee and others*[4] it was held that the primary meaning of "family" could not be extended to include children other than lawful children where there was no context in the will justifying such extension, and in *Re Lim Yew Teok deceased, British Malaya Trustee and Executor Co. Ltd. and another v. Chan Mek Tuan and two others*[5] it was held that the expression "child" may be interpreted to include "adopted sons" if it appears from the will that the testator has used the expression in that sense.

The case of *In re the Estate of Khoo Khye Chear deceased, Russell v. Khoo Boo Boon and others*[6] also referred to by counsel in so far as it is relevant only goes to support the principle that unless an intention on the part of the testator is indicated the words "children"

and "sons" cannot apply to "adopted children" and "adopted sons".

In the cases in which the term "children" has been held to include "adopted children" there is in the will an intention expressed by the testator or necessarily implied from the wording of the will or surrounding circumstances that the testator intended in using the word "children" to include "adopted children". In the present case there is nothing in the will and surrounding circumstances to justify the extension of the word "child" or "children" to include "adopted children". The question is answered accordingly.

Parties to have costs out of Estate.

Order Accordingly.

H. A. BERNEY v. TRONOH MINES LIMITED.

[Orig. Civil Juris. (Evans, J.) November 19, 1947]
[Ipoh — Civil Suit No. 30 of 1947]

Contract of service — Frustration by Japanese invasion of Malaya.

In this case the plaintiff sued for breach of contract of service. On the invasion of Malaya by the Japanese forces the European staff of the Defendant Company was evacuated from Tronoh, Tanjong Tuallang and other places but the plaintiff elected to remain at Tanjong Tuallang. The Defendants contended that consequent on the Japanese occupation of Perak, the contract of employment between them and the plaintiff was discharged by frustration.

Held, that the invasion of Malaya by the Japanese frustrated the performance of the contract and therefore there was no breach of contract by the Defendants.

Cases referred to:—

(1) *Denny, Mott and Dickson Ltd. v. James B. Fraser & Co. Ltd.* (1944) A.C. 274.

(2) *Hirji Mulji's* case (1926) A.C. 497.

CIVIL SUIT.

M. S. Mahendran for the Plaintiff.

J. M. M. Lewis for the Defendants.

Evans, J. : — In this case the plaintiff sues for breach of contract. Although he does not definitely allege breach, certain of the items in his claim are in law based upon breach of contract. He alleges a contract of service with the defendants made verbally on the 30th September, 1939, under which he was entitled to a salary of $345/- per month, the contract was terminable by 3 months' notice, and he was entitled to leave on full pay for a period of 6 months, after a period of service not specified in the statement of claim, together with the cost of a passage to Europe. His employment with the defendants qualified him to contribute to the Malayan Tin and Rubber Provident Fund. He did so contribute, and further claims from the defendants the return of the amount of his contribution. He alleges that in December 1941 the European staff of the defendant company, including the General Manager, left Tronoh and Tanjong Tuallang and that he, the plaintiff, remained behind. This is presumably intended as pleading a breach of contract by the company upon which 3 months' salary is claimed as due to him as such salary would only be payable for breach of contract of service. The defendants denied the contract as alleged, and stated that the plaintiff had been employed by the company on a monthly agreement at the salary stated which carried with it none of the additional terms alleged, that the contract had been terminated by frustration, that there was in law no breach of contract, and that the amount of contribution to the Fund was reclaimable by the plaintiff personally from that Fund over which the defendants had no sort of control.

The only witnesses called were the plaintiff and Mr. John Gordon, the General Manager of the defendant company. The plaintiff failed to prove the contract as pleaded and in fact stated that he was engaged on a monthly basis on the date mentioned in the statement of claim, but that a year later he was given an opportunity of joining the Malayan Tin and Rubber Provident Fund, to which he contributed 10% of his salary and his employers another 10%. He then asked Mr. Biddick, the local Manager, for a contract and was told that he would get the same terms as the others, by which he understood that he was to have leave pay and passage and the 3 months' notice. But he did not call Mr. Biddick as a witness. The plaintiff further relied on a letter of the 8th April, 1947, from the defendants' solicitor to the Vice-Consul of Switzerland, the fourth paragraph of which reads as follows :—

> Without prejudice, however, our clients are willing to pay to him (the plaintiff) the whole of his salary for December 1941, together with the amount of his own contributions to the Malayan Tin and Rubber Provident Fund.

No other evidence was given to suggest that the defendants were in any way responsible for the contributions to the Provident Fund.

The plaintiff admitted that he received orders to evacuate from Tanjong Tuallang and refused to do so. He stated that he then wrote a letter saying that he would stay behind and look after the property, and later on receipt of an order from an officer of the Mines Department made an offer to Mr. Biddick to